

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 99 - 695
 :
 LAMONT HOWELL, :
 a/k/a John Howell :

AND NOW, after a hearing on the Defendant's Motion to Suppress Physical Evidence, on this day of , 2000, and in consideration of the Government's response thereto, the Court finds that the Sturm, Ruger & Co. revolver, model New Model Single-Six, caliber 22 Win Mag RF, serial number 69-47288, loaded with five live rounds of ammunition and one fired cartridge casing, seized from the seat of a Toyota Tercel parked at 601 W. Girard Avenue, Philadelphia, Pennsylvania on July 16, 1999 shall be admitted into evidence:

HONORABLE ROBERT F. KELLY
United States District Judge

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 99 - 695
 :
 LAMONT HOWELL :
 a/k/a John Howell

The United States of America, by its attorneys, Michael R. Stiles, United States Attorney for the Eastern District of Pennsylvania, and Carol Meehan Sweeney, Special Assistant United States Attorney for that district, hereby moves the Court to deny the Defendant's Motion to Suppress Physical Evidence.

A federal grand jury issued a one count Indictment on October 26, 1999 charging defendant Lamont Howell, a/k/a John Howell, an armed career criminal, with possession of a Sturm, Ruger & Co. revolver, model New Model Single-Six, caliber 22 Win Mag RF, serial number 69-47288, loaded with five live rounds of ammunition and one fired cartridge casing, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e).

The defendant has filed a motion to suppress this physical evidence, which was seized from inside a vehicle parked at a gas station at 601 W. Girard Avenue, Philadelphia, Pennsylvania by Philadelphia Police Officers on July 16, 1999.

The government respectfully submits that the seizure of this physical evidence comported with the mandates of the Fourth and Fourteenth Amendments to the Constitution of the United States. Accordingly, the government respectfully requests that the

defendant's motion to suppress be denied.

II. STATEMENT OF FACTS

On July 16, 1999, at 10:55 a.m., Officer Orlando Ortiz responded to a radio call of a person with a gun at 601 W. Girard Avenue. Police radio described the gunman as a black male wearing a white shirt, black jeans, brown boots, and carrying a silver gun. When he drove his marked police vehicle into the gas station found at that location approximately one minute later, Ortiz saw the defendant standing next to a blue Toyota Tercel which was parked at a gas pump. A brown vehicle, occupied by a black female who was sitting on its passenger side, was parked behind it. Neither vehicle was connected by a hose to a pump.¹

The defendant, a black male, was wearing clothing which matched the description Ortiz had received from police radio. There were no other people in the area which matched this description. The defendant looked in the direction of Ortiz' police car and raised his right hand. Officer Ortiz could see that in it was a silver handgun. The defendant reached into the driver's side of the Tercel through an open window, placed the gun on the seat, and walked away from the car in a northerly direction.

Officer Ortiz exited his car and instructed the defendant to walk over to him. The defendant, who had by this time walked a distance of 10-15 feet to the rear of the brown car, came back to Officer Ortiz. In the meantime, Officer Angelo Sanchez and his partner, Officer Andrew McErlain, had driven into the station in

¹ The black female came forward after the defendant's arrest and identified herself as his girlfriend. No police officer on the scene obtained her name.

their unmarked police vehicle.² Ortiz grabbed the defendant and patted down the defendant's waist area for his own protection and that of the others on the scene. He found no weapon on the defendant. He then asked Officer Sanchez to hold the defendant and walked directly over to the blue Toyota Tercel. Ortiz looked into the vehicle and saw in plain view on the front seat the silver handgun. For his own safety and that of everyone else in the area, Ortiz reached into the car through an open window and retrieved the weapon. He found it to be a Sturm, Ruger & Co. revolver, model New Model Single-Six, caliber 22 Win Mag RF, serial number 69-47288 loaded with five live rounds of ammunition and one spent shell casing.³ During this time, he also gestured to Officer Sanchez that he should handcuff the defendant, which the latter did.

Officer Ortiz searched the defendant before putting him into the emergency patrol wagon and found in his right front pants pocket 5 clear plastic packets containing a white powder which

² These officers, too, had heard and responded to the original radio broadcast. Moreover, they, too, observed that the defendant matched the description received over police radio. This is confirmed that Police Department's Biographical Information Report, Form 75-229, a copy of which is attached as Exhibit "A." This indicates that at the time the form was completed the defendant was wearing a "white T-shirt, black jeans, and brown boots." That the defendant acquired a blue shirt during the several hours between the time of his arrest and when he was observed by Detective Frank Green, who supplemented the 75-229 in his own handwriting by noting that the defendant's black jeans were "shorts" and that he then also had a blue shirt, is immaterial.

³ After the handgun was recovered, the defendant stated: "Oh, yeah. A Spanish guy shot at me 3-4 times (in the gas station) but he ran off." Ortiz, who had heard no gunfire en route to the gas station and who saw no evidence of gunfire there, observed that there was only one fired cartridge casing in the firearm which he recovered.

proved to be heroin. The defendant did not possess a driver's license or keys, title, or registration for the blue Toyota Tercel. Officers at the scene ran its license number in an effort to learn the identity of its owner, but learned that there was no record found for that vehicle. No one at the scene admitted that the blue car belonged to him.

The defendant gave the name of "John Howell," and the address of 4414 N. Marshall Street.

III. ANALYSIS

The defendant's motion to suppress the loaded semi-automatic pistol which he had placed in plain view on the seat of a car is bottomed upon his contention that the police unlawfully subjected him to a Terry stop, from which followed an illegal search and an illegal arrest. Specifically, the defendant asserts that the police "stopped, frisked and arrested [him] on 'nothing more substantial than inarticulate hunches" as proscribed by Terry v. Ohio, 392 U.S. 1 (1968), and that "there are no facts that connect Howell with criminal activity." Memorandum of Law in Support of Defendant's Motion to Suppress Physical and Statement Evidence at 3.⁴ It is respectfully submitted that this analysis, which completely ignores the observations of Officers Ortiz, Sanchez, and McErlain, is bottomed upon an incorrect recitation of the facts of this case, and that once the true facts become known, the defendant's motion to suppress must be denied.⁵

⁴ Although the defendant captions his pleading in this way, he includes no objection to the legal admissibility of the defendant's blurt-out statement to Officer Orlando Ortiz.

⁵ The defendant's denial that he was holding a loaded silver revolver in his hand as Officer Ortiz drove his marked police vehicle into the gas station at 601 W. Girard Avenue and that he placed that firearm on the seat of an automobile as Officer Ortiz watched him, gives rise to a question of fact to be resolved by this Court.

At the outset, the government submits that because the defendant chose to abandon the firearm by placing it into a vehicle, the ownership of which is unknown, and then walking away from that vehicle, the seizure of that property does not trigger Fourth Amendment scrutiny. California v. Hodari D. 499 U.S. 621 (1991); United States v. Sealey, 30 F.3d 7, 10 (1st Cir. 1994), (gun and ammunition discarded by defendant while fleeing from officers considered abandoned and did not implicate Fourth Amendment); United States v. Segars, 31 F.3d 655, 657-58 (8th Cir. 1994), cert. den. 130 L.Ed.2d 667 (1995) (cocaine discarded by defendant while fleeing from officers considered abandoned and did not implicate Fourth Amendment). By voluntarily abandoning the firearm in the automobile, the defendant forfeited any reasonable expectation of privacy concerning it. Thus, he cannot seek to suppress it now. See, e.g., United States v. Acosta, 965 F.2d 1248 (3d Cir. 1992) (defendants who threw cocaine vials from their first floor apartment window to the enclosed backyard below had no legitimate expectation of privacy in backyard); United States v. Frazier, 936 F.2d 262, 265 (6th Cir. 1991) (warrantless search valid because bag abandoned after defendant's companion placed bag on floor, left bag when he moved to nearby seating area, and stated bag not his and had never seen it before).

Assuming arguendo the Court rules against the government on the abandonment issue, however, the seizure of the weapon should still be deemed lawful because it was in plain view prior to being confiscated by Officer Ortiz. It is well settled that a law enforcement officer may seize evidence which is found to be in his "plain view." Horton v. California, 496 U.S. 128 (1990). In Horton, the Supreme Court set forth three requirements for valid seizures of evidence in plain view. First, the officer must not have violated the Fourth Amendment in arriving at the place from which the evidence could be plainly

viewed. Second, the incriminating character of the evidence must be "immediately apparent." Third, the officer must have a lawful right of access to the object itself. 496 U.S. at 141. See also, United States v. Willis, 37 F.3d 313, 316 (7th Cir. 1994) (warrantless seizure of gun valid because officer in legitimate position to view gun when car parked in school parking lot, subject to observation by anyone who cared to look, and driver's side door open); United States v. Bradshaw, 102 F.3d 204, 211 (6th Cir. 1996) (warrantless seizure of bag of marijuana valid because clearly observed by officer through front passenger window).

In the instant case, while still in his patrol car in a public gas station, Officer Ortiz personally saw the defendant standing near an unoccupied vehicle holding what he recognized to be a silver handgun. Before he touched the defendant or in any way asserted his authority over him, therefore, Ortiz had probable cause to arrest the defendant.⁶ The defendant immediately divested himself of this weapon by placing it on the

⁶ A law enforcement officer may arrest an individual without a warrant for any offense committed by the arrestee in the presence of the law enforcement officer, Gerstein v. Pugh, 420 U.S. 103, 113 (1975), and for any felony if that arrest is supported by probable cause. United States v. Watson, 423 U.S. 411, 418 (1976). Probable cause to effectuate a warrantless arrest exists when police have, at the moment of arrest, knowledge of facts and circumstances grounded in reasonably trustworthy information and sufficient in themselves to warrant a belief by a prudent person that an offense has been or is being committed by the person to be arrested. Beck v. Ohio, 370 U.S. 89, 91 (1964).

By definition, the existence of probable cause to arrest the defendant demonstrates that Officer Ortiz possessed more than the amount of information needed to conduct a pat-down for weapons. Terry v. Ohio, 392 U.S. 1 (1968) (a police officer may stop an individual "reasonably suspected of criminal activity," question him briefly, and perform a limited pat-down for weapons.)

seat of that vehicle and walking away from it. Ortiz, for the safety of himself and others, and in full compliance with the requirements of Horton, reached into the car through an open window and seized the weapon.

In sum, there was no illegal stop of the defendant or search of multiple vehicles, as the defendant contends, prior to the recovery of the weapon. Moreover, it is not "highly probable that the police officers stopped the defendant because he is a black man and was in the area." Memorandum of Law in Support of Defendant's Motion to Suppress Physical and Statement Evidence at 4. Rather, after personally witnessing this particular individual holding a firearm, Officer Ortiz patted him down for weapons, instructed Officer Sanchez to hold him there, and recovered that firearm. It is respectfully submitted that this type of level-headed police work - which resulted in the confiscation of a loaded firearm with no injury to civilian or law enforcement personnel - is to be commended.

WHEREFORE, the United States of America respectfully requests that the Court deny the defendant's motion to suppress physical evidence and enter the attached order.

Respectfully submitted,

MICHAEL R. STILES
UNITED STATES ATTORNEY

J. HUNTLEY PALMER, JR.
Assistant United States Attorney
Chief, Firearms/Arson

Carol Meehan Sweeney
Special Assistant United
States Attorney

Date: February , 2000

CERTIFICATE OF SERVICE

I certify that on this day I caused a copy of the
government's detention motion to be served by hand addressed to:

Edson Bostic, Esquire
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CAROL MEEHAN SWEENEY
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Date: _____